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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 BARBARA A. PINKSTON,

9 *Petitioner,*

10 vs.

11  
12 SHERYL FOSTER, *et al.*,

13 *Respondents.*  
14

2:07-cv-01305-KJD-LRL

ORDER

15 This habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on  
16 the remaining claims. The Court reaches only Ground 3 of the amended petition.

17 ***Background***

18 Petitioner Barbara Pinkston seeks to set aside her 1997 Nevada state conviction,  
19 pursuant to a jury verdict, of first degree murder with the use of a deadly weapon.

20 Pinkston was convicted of the murder of Greg Payne on Father's Day, June 18, 1995.  
21 It was undisputed that Pinkston shot Payne twice with a .380 caliber semiautomatic handgun  
22 as he was walking toward his truck. The dispute at trial focused upon the circumstances  
23 leading up to the shooting, Pinkston's state of mind, and her defense that she was a domestic  
24 violence victim and reasonably believed that Payne intended to kill her.<sup>1</sup>

25  
26 <sup>1</sup>See, e.g., #17, Ex. 33, at 23-24, 31-33, 41-42 & 47 (defense opening statement). The following  
27 summary in the text is intended only as an overview of the basic factual particulars of the case in order to  
28 provide context for the discussion of the issues. Any absence of mention of specific evidence in this overview  
does not signify that the Court has overlooked or ignored that evidence in considering a particular issue.

(continued...)

1 Pinkston met Payne initially when he responded to her ad in October 1992 looking for  
2 a roommate to help with the rent on her house. The roommate relationship began as a  
3 platonic one, but Pinkston and Payne became romantically involved in November 1992. The  
4 romantic relationship was a rocky one, however, basically from its inception. The relationship  
5 also produced a daughter even as it initially unraveled. In addition to producing a child, the  
6 relationship lead to a number of judicial proceedings concerning, *inter alia*, protection orders  
7 and child visitation.<sup>2</sup>

8 A court hearing was scheduled for Monday, June 19, 1995, to address custody and  
9 visitation of their daughter.<sup>3</sup>

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11 \_\_\_\_\_  
12 <sup>1</sup>(...continued)

13 The Court makes no credibility findings or other factual findings regarding the truth or falsity of  
14 evidence or statements of fact in the state court. The Court summarizes same solely as background to the  
15 issues presented in this case. No statement of fact made in describing statements, testimony or other  
16 evidence in the state court, whether in this overview or in the discussion of a particular issue, constitutes a  
17 finding by this Court.

18 <sup>2</sup>See, e.g., #18, Ex. 40, at 49-78 (Pinkston's trial testimony providing her account of the early part of  
19 the relationship). While the term "roommate" commonly used in this context also was used at trial, the lodger  
20 in this instance was to reside in another part of the house rather than the same room. Pinkston would have  
21 been approximately 40 years old in 1992. See #18, Ex. 40, at 39-40.

22 Much of the trial evidence pertained to the multiple domestic judicial proceedings and the charges  
23 and counter-charges made by both sides therein, as it bore upon the contested issue of Pinkston's state of  
24 mind at the time that she shot Payne. The evidence, in a sense, echoed the "he-said, she-said" disputes  
25 from the domestic judicial proceedings, with Payne of course no longer being alive to speak for himself. The  
26 State sought to portray Pinkston as an obsessed, controlling, and manipulative figure reminiscent of the  
27 Glenn Close character in the movie "Fatal Attraction" who lied to the courts and others in an effort to get what  
28 she wanted, as to which she herself often was conflicted in her own mind. The defense sought to portray  
Pinkston instead as the victim of a physically and verbally abusive Payne who posed a threat of death or  
serious physical harm to Pinkston, their daughter, and her mother and also, allegedly, presented a threat of  
sexual abuse to their daughter.

The Court does not seek to diminish the significance of such evidence in the brief summary set forth  
herein. The Court has not extensively catalogued the back and forth of the domestic dispute evidence  
because the bottom line remains that the jury was presented with two dramatically different pictures of the  
circumstances that preceded the shooting as they related to Pinkston's state of mind at the time. The critical  
point, as discussed herein, is that – under the jury instructions given and the arguments made to the jury –  
the jury could believe Pinkston's explanation of the evidence that the State relied upon to establish that she  
preplanned the killing and still potentially find her guilty of first-degree murder.

<sup>3</sup>E.g., #17, Ex. 35, at 272-74.

1 In personal journal entries in early June 1995, Pinkston discussed her frustration with  
2 the court proceedings and her belief that the presiding judge in the upcoming June 19, 1995,  
3 hearing had turned against her.<sup>4</sup> In an undated document prepared at some point after May  
4 25, 1995 and before June 18, 1995, Pinkston outlined possible options as follows:

5 Option No. 1 is to do nothing, to let the courts place us in  
6 danger and have Kaitlyn scarred emotionally and probably  
7 physically abused, to willingly give her to someone who does not  
8 have her best interests at heart and who is now using her as a  
vehicle to further continue this very sick relationship.

9 Option No. 2 is to run away, to go underground, but if I'm  
10 located I will be sent to prison for child stealing, and Greg will be  
11 given Kaitlyn permanently.

12 No. 3 is to commit suicide, but Kaitlyn will be given to Greg  
13 permanently.

14 And Option No. 4 is to kill Greg.

15 #17, Ex. 35, at 163-64, 221-24 & 230-31.

16 Pinkston maintained at trial -- through her own testimony and in part through that of a  
17 nursing student counselor that she saw at the time -- that this "options memo" was merely a  
18 self-counseling "problem solving exercise" where all alternatives, no matter how unrealistic,  
19 were written down. Pinkston had a bachelors in sociology, and at the time she was in a  
20 masters program for sociology at UNLV. She testified that she had been writing personal  
21 journals every year of her life since she was thirteen years old. Pinkston maintained that the  
22 option stated as to killing Payne did not reflect something that she actually intended to do and  
23 that each one of the options discussed was "absolutely impossible."<sup>5</sup>

24 At some point after 12:30 p.m. on the afternoon of the shooting, Pinkston went to a  
25 notarial service and had a guardianship document notarized. The document stated that it was  
26 Pinkston's desire to have her daughter remain in the custody and care of Pinkston's mother

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27 <sup>4</sup> See, e.g., #18, Ex. 44, at 154 (State's recital of journal entries in closing argument).

28 <sup>5</sup> #18, Ex. 38, at 7-11 & 14-16 (Consuella Freeman); *id.*, Ex. 40, at 39-40 & 167-73 (Pinkston); *id.*, Ex. 41, at 4-6 (same).

1 in the event of Pinkston's death "or under any unfortunate circumstance which would prevent  
2 me from taking care of" her daughter itself.<sup>6</sup>

3 Pinkston maintained at trial that she had the guardianship document notarized because  
4 she was afraid that Payne was about to kill her, following an alleged threat by Payne on the  
5 Friday night before Father's Day. She testified that she planned to file the guardianship  
6 document at the court proceeding the next day on Monday. According to Pinkston, she  
7 stopped at a copy store and made copies of the notarized document, returned home and put  
8 one copy in her notebook, and then put the original and three copies in an envelope in  
9 preparation for filing the document the next day while at court.<sup>7</sup>

10 On the afternoon of the shooting, Pinkston showed up at a facility called the Discovery  
11 Zone where Payne was having a supervised visitation of their then nineteen-month old  
12 daughter with Pinkston's mother present. Pinkston herself was not supposed to be present.

13 Thomas Page testified as follows in regard to what he observed while taking two  
14 cigarette breaks outside the Discovery Zone. He saw Pinkston initially approach on foot from  
15 what he perceived to be the direction of the parking lot for a neighboring business, Mountasia.  
16 About 30 to 45 minutes later, he heard and saw Pinkston and Payne arguing outside the  
17 facility. While he was not trying to listen to their heated conversation, and heard only "bits and  
18 pieces," he heard references to protective orders and the fact that neither was supposed to  
19 be near the other. Page did not hear Payne make any threats toward Pinkston. Page did not  
20 see Payne make any combative or assaultive physical gestures toward her. Page, again, did  
21 not hear every exchange between the two.<sup>8</sup>

22 Jack Wilkins walked out to and from his vehicle briefly during the time that Pinkston  
23 and Payne were arguing. Wilkins observed Pinkston standing over Payne who was sitting on  
24 the curb with his head down, fidgeting with grass or gravel on the ground. Wilkins perceived  
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26 <sup>6</sup>FN #17, Ex. 35, at 45-67 (notary); *id.*, at 157-60 (detective).

27 <sup>7</sup>#18, Ex. 40, at 173-75, 182 & 183-88 (Pinkston).

28 <sup>8</sup>#17, Ex. 33, at 50-60, 70-71, 81-87 & 90-92; cf. *id.*, at 91 ("I was not trying to hear it.").

1 Pinkston to be acting aggressively and that Payne was not. Wilkins heard Payne say at one  
2 point: "That's why your father blew his f—ing head off." Pinkston responded: "Come on, you  
3 know," with the intonation of "Give me a break." Wilkins did not hear the specifics of any  
4 other part of the argument during the brief interval that he was within earshot.<sup>9</sup>

5 Eventually, Thomas Page heard Payne state to Pinkston "something to the effect of,  
6 'I'm out of here. I'm leaving. You shouldn't be here.'" Payne walked toward his truck, and  
7 Page testified that it "appeared the he was putting his keys in his truck to leave."<sup>10</sup>

8 Pinkston testified that she thought Payne was going to his truck for a gun that she  
9 maintained that he kept under the seat. According to Pinkston, Payne kept trying during their  
10 discussion that day to get her to meet with him at a park in a remote area that she had been  
11 to the day before with her mother and daughter. Pinkston testified that Payne said to her  
12 immediately before walking toward the truck for her to "stand right there," that she was dead,  
13 and that he was going "to blow [her] f\_\_\_ing head off." She testified that she believed that  
14 he was going to follow through on multiple threats allegedly made to her starting in late  
15 October 1994.<sup>11</sup>

16 Thomas Page saw Pinkston walk quickly up to about six to eight feet behind Payne,  
17 pull a gun, assume a stance with her feet shoulder width apart, and fire. Payne dropped or

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18 <sup>9</sup>#17, Ex. 33, at 151-81.

19 <sup>10</sup>#17, Ex. 33, at 60-62.

20 <sup>11</sup>See #18, Ex. 40, at 205-24 (day of incident); *id.*, at 134-45, 160-62 & 173 (detailing prior alleged  
21 threats).

22 A Pinkston coworker, Robert Schmidt, testified for the defense that Payne said to him on the phone  
23 in late December 1994, when Schmidt was being evasive as to Pinkston's whereabouts or availability: "Well,  
24 you just tell her next time you see her, she can run but she can't hide." #17, Ex. 37, at 106-07.

25 A Pinkston neighbor, Mary Marineau, testified for the defense that she observed an incident shortly  
26 before Christmas Eve, 1994, where a man arguing with Pinkston shouted at Pinkston in the driveway of her  
27 residence: "You can't run far enough, bitch," and "You're dead meat, and so is that brat of yours." According  
28 to Marineau, Pinkston drove away and the man went to his pickup truck, retrieved a handgun, and then tried  
to drive after Pinkston while handling the steering wheel with the gun in hand. Marineau identified Payne at  
trial as the man that she saw from a photograph presented to her by defense counsel. Marineau testified that  
she did not report the incident to the police at the time because she did not get a license number. #18, Ex.  
38, at 86-100.

1 collapsed "like a sack of potatoes" after the shot. Page ran inside the Discovery Zone to tell  
2 someone to call 911 after the shot.<sup>12</sup>

3 At one point after Thomas Page came back outside, he made eye contact with  
4 Pinkston, who was walking away, at which point she accelerated her pace back toward the  
5 neighboring business, Mountasia.<sup>13</sup>

6 John Egbert testified as follows. He was working at Mountasia disposing of waste in  
7 the dumpster enclosure in the rear. He heard a loud noise like a gunshot or a tire blowout.  
8 He stepped outside the enclosure, looked around, and then returned inside to continue his  
9 task. About ten seconds after the first noise, he heard a second noise, with it being more  
10 clear that the two noises sounded like gunshots. About twenty seconds later, he stepped out  
11 of the enclosure again and observed a woman moving at a jog from the Discovery Zone  
12 toward the front of Mountasia.<sup>14</sup>

13 Pinkston testified that as Payne walked toward his truck she was terrified. According  
14 to Pinkston, there was a very loud noise in her ears, and she felt "like pushing on my face."  
15 She testified that she got the gun out of her purse but that she did not mean to pull the trigger.  
16 According to Pinkston, after the first shot, Payne "just stood there" and turned away from the  
17 truck door, and she thought that the shot had missed. She testified that she heard the second  
18 shot but did not remember when she fired it.<sup>15</sup>

19 The apparent first shot hit Payne in the right back. The bullet traveled through his right  
20 lung, passed through the aorta, traveled through his right lung, and then exited his left chest  
21 before penetrating the driver's side window of his truck, possibly hitting and denting the  
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23 <sup>12</sup>#17, Ex. 33, at 62-67, 72-81 & 94-103. Defense counsel maintained in closing argument that the  
24 surveillance video tended to establish that Page initially heard rather than saw the first shot. #18, Ex. 44, at  
25 82-86. Be that as it may, Page testified, including on cross-examination, that he saw rather than merely  
heard the first shot and that he then saw Payne drop immediately "like a rock" or "like a sack of potatoes."

26 <sup>13</sup>#17, Ex. 33, at 65-68 & 87-103.

27 <sup>14</sup>#17, Ex. 33, at 134-150.

28 <sup>15</sup>#18, Ex. 40, at 224-26.

1 painted headliner and coming to rest on the seat cushion on the passenger side. The  
2 apparent second shot entered through Payne's right cheek near the ear, passed through a  
3 number of nonvital tissues, exited on the back of his left neck, reentered his body in his upper  
4 left shoulder or back, and came to rest under the skin in his left back.<sup>16</sup>

5 A lay witness who tried, unsuccessfully, to find a pulse before the police and medical  
6 responders arrived observed Payne laying on the ground with the left side of his face on the  
7 ground and the right side of his face up. The first responding fire rescue crew similarly found  
8 Payne, with no respiration, pulse or cardiac activity, laying with the left side of his face on the  
9 ground. The lividity, or blood pooling, and pattern of final blood flow from the wounds  
10 observed during the autopsy additionally tended to establish that Payne was laying on his  
11 back when he died.<sup>17</sup>

12 The medical examiner opined that Payne was standing either next to his truck or fairly  
13 close to it when the apparent first bullet struck him and he fell backwards. The examiner  
14 opined that the trajectory of the apparent second shot was consistent with Payne then being  
15 shot while he was laying on the ground, with the left side of his head turned toward the  
16 ground. The medical examiner acknowledged that this was not the only possible scenario as  
17 to Payne's position at the time of the second shot, but his conclusion based upon the physical  
18 evidence was that Payne was on his back when the second shot hit him. The defense expert  
19 opined that this scenario as to the second shot was only one of many possible scenarios  
20 reflected by the forensic evidence.<sup>18</sup>

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23 <sup>16</sup>#17, Ex. 35, at 79-85 & 101 (medical examiner); *id.*, Ex. 36, at 91, 148 & 152-53 (crime scene  
24 technicians); *id.*, at 213 & 218-19 (firearm and tool mark examiner); #18, Ex. 38, at 56-57 & 75-76 (defense  
25 crime scene reconstruction expert). As testified to by the medical examiner, the aorta is the very large artery  
26 through which the blood going to the rest of the body passes through after exiting the heart.

27 <sup>17</sup>#17, Ex. 34, at 11-37 (John Barr, who testified at one point that the right side of the face was to the  
28 ground, but this testimony was corrected thereafter); *id.*, at 147-58 (fire rescue); *id.*, Ex. 35, at 87-89 (medical  
29 examiner).

<sup>18</sup>#17, Ex. 35, at 100-02 & 110-15 (medical examiner); #18, Ex. 38, at 65-71 & 78-85 (defense crime  
scene reconstruction expert).

1 The State's evidence tended to establish that the apparent first shot killed Payne  
 2 almost immediately, within a span of approximately twenty to thirty seconds, by penetrating  
 3 the aorta. The apparent second shot did not pass through any vital structures, such as a  
 4 major blood vessel or the spinal cord, before exiting the back of the neck and passing through  
 5 similarly nonvital tissue in Payne's back.<sup>19</sup>

6 A third unfired and ejected cartridge that matched the two fired rounds also was found  
 7 at the scene. The tool markings on the ejected cartridge established conclusively only that  
 8 the round had been loaded into and then cycled through the semiautomatic pistol (*i.e.*,  
 9 chambered and then extracted from the firing chamber) at some point without being fired.  
 10 The markings were not inconsistent with the round having jammed during an unsuccessful  
 11 firing attempt and having been cleared, but the markings did not conclusively establish that  
 12 the round had jammed. The markings also were consistent with the cartridge simply having  
 13 been loaded and then cycled through the pistol normally without firing. The markings thus  
 14 also were not inconsistent with a person pulling the slide back and chambering a round when  
 15 a cartridge already was in the firing chamber, which would result in the previously-chambered  
 16 round being ejected without being fired. Neither the State nor the defense expert could opine  
 17 as to whether the unfired cartridge was ejected before, between, or after the two shots that  
 18 were fired.<sup>20</sup>

19 At 4:24 p.m. on June 18, 1995, Pinkston left a message on her home answering  
 20 machine for her infant daughter. Pinkston said, *inter alia*: "I didn't know what else to do."<sup>21</sup>

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23 <sup>19</sup>#17, Ex. 35, at 81-82, 91, 105 & 110 (medical examiner). The defense crime scene reconstruction  
 24 expert stated variously that he would defer to the medical examiner as to whether the second shot could have  
 25 been fatal, that he did not have a position on that issue, and that he "would assume" that the second shot  
 26 "certainly would have that capability as well." Regardless of this qualified assumption, the defense expert  
 was neither tendered nor qualified as an expert in forensic pathology. #18, Ex. 38, at 74-75.

27 <sup>20</sup>#17, Ex. 36, at 130-33 & 145-48 (crime scene technician); *id.*, at 211-12, 222-25 & 227-35 (firearm  
 and tool mark examiner); #18, Ex. 38, at 58-61, 76-77 & 81-82 (defense crime scene reconstruction expert).

28 <sup>21</sup>#17, Ex. 35, at 200-03.



1 At approximately 5:00 p.m., Pinkston turned herself in at a police station in downtown  
2 Las Vegas. She responded affirmatively that she had committed a crime of violence and that  
3 the victim was at the Discovery Zone. She informed the desk sergeant that the weapon was  
4 in the trunk of her car. When her vehicle was later impounded and searched, the .380  
5 handgun and a seven-round magazine holding four live rounds was found in a purse in the  
6 trunk of the vehicle. As of that time, there was nothing else in the purse other than the  
7 handgun and magazine. The hard gun case for the handgun was in a brown paper bag in the  
8 trunk.<sup>22</sup>

9 When interviewed shortly thereafter by detectives, Pinkston stated, after learning that  
10 Payne had died, that she had shot Payne twice. According to the interviewing detective, she  
11 said that “she didn’t think she knew what she was doing when she fired the first shot but she  
12 did when she fired the second shot.” She stated that “she did not know what was going on  
13 in her mind.” According to the detective’s testimony on direct examination, Pinkston did not  
14 state to the detectives at that time that she was in fear for her life, that Payne had threatened  
15 her prior to the shooting, that she believed that Payne had a gun, or that she fired to protect  
16 herself. According to the detective, Pinkston instead said that “she did not know what was  
17 going to happen when he got to the truck.”<sup>23</sup>

18 However, when defense counsel went back through the transcript of the statement with  
19 the detective on cross-examination, there were numerous exchanges, including key  
20 exchanges presented as unequivocal statements on direct, where Pinkston did not complete  
21 sentences and/or her voice trailed off as she broke down. The detective testified that  
22 Pinkston appeared upset and was crying “on and off” throughout the interview, with the  
23 detective stating to Pinkston at the time that she was “acting devastated.” When defense  
24 counsel went back through the transcript, Pinkston’s statements were not necessarily as

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26 <sup>22</sup>#17, Ex. 33, at 119-34 (desk sergeant); *id.*, Ex. 35, at 131-36 (detective); *id.*, Ex. 36, at 94-95 &  
27 136-42 (crime scene technicians); *id.*, at 194-95 (firearm and tool mark examiner); #18, Ex. 42, at 96-97 &  
172-72 (detectives).

28 <sup>23</sup>#18, Ex. 42, at 85-95 & 114-15 (detective).

1 unequivocal as the detective's testimony on direct indicated. Pinkston specifically stated: "I  
2 just felt, I did have a gun with me, and I just felt if he had gotten in that car that he was, that  
3 would be the end of me."<sup>24</sup>

4 The police did not find a gun in Payne's truck following the shooting. When the crime  
5 scene technicians continued processing the scene after examining and photographing  
6 Payne's body, both doors to the truck were locked and the keys were on the ground next to  
7 Payne's body. The driver's side window was broken apparently from a gunshot.<sup>25</sup>

8 Nor did the police find a gun when they searched Payne's residence two days later.  
9 Las Vegas police records did not show that a gun was registered to Payne. A local ordinance  
10 requires handgun owners to register their weapons with the local police.<sup>26</sup> The State called  
11 a number of landlords, employers and/or friends who testified that they had not seen Payne  
12 with a gun and/or had not heard him speak of having a gun.<sup>27</sup>

13 When the police executed a search warrant of Pinkston's residence, her mother  
14 unilaterally directed the police to a three-ring binder. The binder included materials pertaining  
15 to the domestic dispute litigation between Pinkston and Payne. The first page in the binder  
16 was dated June 16, 1995, and stated, *inter alia*:

17 To mom, my attorney or whoever has possession of this  
18 book. . . . You may use any contents in my defense or in my  
19 behalf . . . .

20 #17, Ex. 35, at 152-55 & 215-16.

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22 <sup>24</sup>#18, Ex. 42, at 98-114 & 115-17 (detective).

23 <sup>25</sup>#17, Ex. 36, at 90-92 & 135-36.

24 <sup>26</sup>#17, Ex. 35, at 121 (search of Payne residence); #18, Ex. 42, at 130-31 (absence of entry in local  
25 firearm registration records). Pinkston had not registered her handgun following her return to Las Vegas after  
26 purchasing the gun while living in Carson City in March, 1995. She testified that she was not aware of the  
27 Clark County local registration requirement. #17, Ex. 33, at 104-18 (Pinkston's gun purchase in Carson City);  
*id.*, Ex. 35, at 182-86 (materials associated with Pinkston's handgun found at her residence).

28 <sup>27</sup>#18, Ex. 42, at 125 (Helen Redford); *id.*, at 136-38 (James Schollard, who testified specifically  
about what he saw in Payne's truck); *id.*, at 151 (Jacques Jasmin); *id.*, at 155 (Lee Bennett).

Pinkston maintained that the cover page to the binder had been there continuously prior to June 1995 and that the binder contained "all the family court papers." She testified that she had updated the cover page with a June 16, 1995, date because the prior cover page had worn out.<sup>28</sup>

The binder included, *inter alia*, the guardianship document that Pinkston had notarized on June 18, 1995.<sup>29</sup>

The police also found a spiral bound notebook that included the "options" memo in which Pinkston discussed various options.<sup>30</sup>

At trial, the state district court instructed the jury, *inter alia*, as follows:

Murder of the first degree is murder which is perpetrated by any kind of wilful, deliberate, and premeditated killing of another human being.

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

The law does not undertake to measure in units of time the length of the period during which premeditation is formed. *It may be as instantaneous as successive thoughts of the mind.* The test is not the duration of time, but rather the actual formation of premeditation. If the State proves beyond a reasonable doubt that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is wilful, deliberate and premeditated murder.

#18, Ex. 47, Instruction Nos. 7 and 8 (emphasis added).

The trial court rejected a proposed defense instruction that instead would have charged the jury as follows:

Premeditation is a design -- a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

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<sup>28</sup>#18, Ex. 40, at 175-79.

<sup>29</sup>#17, Ex. 35, at 155-59.

<sup>30</sup>#17, Ex. 35, at 161-65.

*Deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed [course] of action.*

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly *deliberate and premeditated*. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of the time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, *but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.*

#18, Ex. 45, at electronic docketing page 7 (emphasis added).

During closing argument, the State relied upon evidence, such as the options memo, that the prosecution maintained established that Pinkston planned to murder Payne and went to the Discovery Zone specifically to carry out this purpose.

The State further argued, however, pursuant to Jury Instruction No. 8, that Pinkston would be guilty of first-degree murder even if she had formed an intent to kill Payne instantaneously. The prosecutor argued:

Some lay persons come to court with the notion that premeditation requires extensive planning. Judge Leavitt clarifies this issue. He continues in Instruction No. 8, the law does not undertake to measure in units of time the length of the period during which premeditation is formed. It may be as instantaneous as successive thoughts of the mind.

I'd like to give you an example. I'm sure we've all been in this situation. . . . We're going 45 miles an hour in a 35 zone, and we are confronted with a yellow light and you need to decide, do you go through the light or do you stop? But what happens? The first thing you do is look down at your speedometer. How fast am I speeding now? Do I speed up even more? You look around. Any cops here? You look in your rear-view mirror. Is there a big semi behind me? If I slam on my brakes, am I going to be in an accident?

That total thought process is done within a second. That is sufficient for premeditation. . . .

#18, Ex. 44, at 40-41.

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1 The prosecutor accordingly likened the amount of prior intention required to convict for  
 2 first-degree murder to the literally split-second decision to speed through an intersection  
 3 against a yellow light.

4 In the rebuttal argument, the State again relied upon evidence that it maintained  
 5 established preplanning. The prosecutor reiterated, however, four paragraphs from the end  
 6 of the argument:

7 . . . . Premeditation and deliberation need not be for a day,  
 8 an hour, or even a second. It can be as instantaneous as  
 successive thoughts in the mind. . . .

9 #18, Ex. 44, at 162.

### 10 ***Discussion***

11 The Court reaches only Ground 3 of the amended petition.

12 In Ground 3, petitioner alleges that she was denied due process in violation of the Fifth  
 13 and Fourteenth Amendments because the trial court's jury instructions allegedly failed to  
 14 adequately distinguish between the elements of malice aforethought, premeditation, and  
 15 deliberation. Petitioner maintains, *inter alia*, that the premeditation instruction used in her  
 16 case constituted what is referred to under Nevada state practice as a *Kazalyn* instruction, as  
 17 a substantially similar instruction first appeared in a published decision in *Kazalyn v. State*,  
 18 108 Nev. 67, 825 P.2d 578 (1992).<sup>31</sup> The Supreme Court of Nevada later concluded in  
 19 *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), that the *Kazalyn* instruction "blur[red] the  
 20 distinction between first- and second-degree murder" by not sufficiently distinguishing  
 21 between the distinct elements of deliberation and premeditation. See 116 Nev. at 235, 994  
 22 P.2d at 713. The state supreme court subsequently held, however, that *Byford* did not signify  
 23 that the giving of the *Kazalyn* instruction violated any constitutional rights, such that the *Byford*  
 24 holding was not a holding of constitutional dimension that must be retroactively applied.  
 25 *Garner v. State*, 116 Nev. 770, 6 P.3d 1013, 1025 (2000), *overruled on other grounds by*  
 26 *Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002). The Ninth Circuit has held, however,

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 28 <sup>31</sup> Compare #18, Ex. 47, Instruction No. 8, with *Kazalyn*, 108 Nev. at 75, 825 P.2d at 583.

1 that the giving of a *Kazalyn* instruction deprives a defendant of due process, subject to  
2 harmless error analysis. *Polk v. Sandoval*, 503 F.3d 903, 909-11 (9<sup>th</sup> Cir. 2007).

3 In a prior ruling in the present case, the Court held that an independent substantive  
4 federal constitutional claim of jury instruction error in this regard – including specifically a  
5 federal constitutional claim based upon the *Kazalyn* error in failing to distinguish between  
6 premeditation and deliberation – had not been fairly presented in the state courts through to  
7 the state supreme court.<sup>32</sup>

8 The Court held that, *inter alia*, Ground 3 was constructively exhausted, however,  
9 because it was more probable than not that the state supreme court would apply law of the  
10 case to the only conceivable basis for overcoming state procedural bars to the substantive  
11 claim – *i.e.*, reliance upon ineffective assistance of appellate counsel to establish cause – if  
12 petitioner were to return to state court to exhaust the claim. On state post-conviction review,  
13 the Supreme Court of Nevada clearly addressed and rejected a claim that appellate counsel

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14  
15 <sup>32</sup> In the answer, respondents urge that federal Ground 3 presents only a claim of jury instruction error  
16 based upon a failure to distinguish between malice aforethought and premeditation/deliberation and not a  
17 claim of error based upon a failure to distinguish between premeditation and deliberation. Respondents  
maintain that the *Byford* decision thus is inapposite to the claim of jury instruction error purportedly actually  
presented in federal Ground 3.

18 Respondents' argument misses the mark. Petitioner does indeed present allegations in federal  
19 Ground 3 asserting that the instructions did "not distinguish between the concepts of express malice and  
20 premeditation/deliberation." #22-2, at 10, lines 4-5. Ground 3 further alleges, however, specifically and  
expressly invoking *Byford*, that the instructions given in her case further impermissibly blurred the distinction  
21 between premeditation and deliberation. *Id.*, at 10-11. This Court accordingly properly construed federal  
Ground 3 in its prior ruling as including a claim specifically of *Kazalyn* error. #29, at 8-9 & 11. An independent  
substantive claim of federal constitutional error based upon the *Kazalyn* error was not fairly presented to the  
22 state courts through to the state supreme court. Such a claim is constructively exhausted, however, as  
discussed in the text.

23 In this same vein, respondents urge in the answer that federal Ground 3 presents only a state law  
24 claim of jury instruction error that has no federal constitutional implications. Under controlling Ninth Circuit  
precedent, however, petitioner clearly presents a federal constitutional claim. Indeed, the Ninth Circuit held in  
25 *Polk* that the Nevada Supreme Court's conclusion that the error did not give rise to a federal due process  
violation was contrary to clearly established federal law as determined by the United States Supreme Court.  
503 F.3d at 911. Petitioner thus not only clearly presents a federal claim, she presents a federal due process  
26 claim that, subject to harmless error analysis, is a viable claim under Ninth Circuit precedent that is binding on  
this Court.

27  
28 Respondents' effort to recast petitioner's claim as one that does not present a *Kazalyn* error and that  
further does not present a federal due process claim thus is unpersuasive.

1 was ineffective for failing to raise a claim of *Kazalyn* error as recognized in *Byford* as a federal  
 2 constitutional claim.<sup>33</sup> This Court concluded that the chances were “virtually nil” that the  
 3 Supreme Court of Nevada would not apply law of the case to its prior rejection of this claim  
 4 of ineffective assistance of appellate counsel if petitioner sought to exhaust the underlying  
 5 independent substantive claim. The Court therefore held that, given that there was no  
 6 chance now that the substantive claim would be heard on the merits due to the application  
 7 of state procedural bars, the claim was constructively exhausted.<sup>34</sup>

8 Respondents, per the scheduling order entered for the case, then moved to dismiss,  
 9 *inter alia*, Ground 3 on the basis of procedural default. The Court rejected petitioner’s  
 10 arguments for avoiding the procedural default of Ground 3 with the exception of her reliance  
 11 upon ineffective assistance of appellate counsel to establish cause and prejudice excusing  
 12 the default. The Court deferred further consideration of this issue until after the filing of an  
 13 answer and reply that more fully addressed the underlying facts and law pertaining to whether  
 14 petitioner was denied effective assistance of appellate counsel in this regard.<sup>35</sup>

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15  
 16 <sup>33</sup>#20, Ex. 101, at 8-9.

17 <sup>34</sup>#29, at 8-12.

18 <sup>35</sup>#33. Petitioner reurges in the reply arguments that the Court considered and rejected in the prior  
 19 order (#33). The prior order was not an invitation to reurge procedural default arguments that the Court  
 20 already had rejected and as to which petitioner already had made her record. The Court instead was looking  
 21 for argument directed to the merits of Ground 3 as it pertained to whether petitioner was denied effective  
 assistance of appellate counsel in failing to raise the claim as establishing cause and prejudice excusing the  
 procedural default of Ground 3.

22 To reiterate, the Court never has held herein that the independent substantive claim in Ground 3 itself  
 23 would be barred by law of the case. As stated in #33, “[t]he Court instead held that “[t]he likelihood that the  
 24 Supreme Court of Nevada would revisit its holding on the *ineffective assistance claim* rather than apply the  
 law of the case doctrine to *a claim of cause and prejudice based upon such alleged ineffective assistance* is  
 25 virtually nil.” #33, at 4 (emphasis in original). Petitioner’s continued reliance in the reply upon the Supreme  
 Court’s *Ylst* and *Cone* decisions thus is misplaced. The holdings in these cases do not resolve the issue of  
 26 whether the substantive claim in Ground 3 should be barred by procedural default. The Nevada law of the  
 case doctrine is relevant here only to establish that the Supreme Court of Nevada is not likely to revisit the  
 ineffective assistance claim relied upon by petitioner to establish cause and prejudice. See #33, at 3-4.

27 Petitioner’s contention that the state supreme court adjudicated the merits of Ground 3 when it  
 28 considered whether she was denied ineffective assistance of appellate counsel in failing to raise the claim  
 (continued...)



1 The Court now reaches the procedural default issue reserved in the prior order. That  
 2 is, the Court reaches the question of whether petitioner can establish ineffective assistance  
 3 of appellate counsel in failing to raise the claims in Ground 3 on direct appeal, as a basis for  
 4 establishing cause and prejudice excusing the procedural default of the underlying  
 5 independent substantive claims in Ground 3.

6 Under the procedural default doctrine, federal review of a habeas claim may be barred  
 7 if the state courts rejected the claim on an independent and adequate state law ground due  
 8 to a procedural default. Federal habeas review will be barred on claims rejected on an  
 9 independent and adequate state law ground unless the petitioner can demonstrate either: (a)  
 10 cause for the procedural default and actual prejudice from the alleged federal law violation;  
 11 or (b) that a fundamental miscarriage of justice will result absent review. *See, e.g., Bennet v.*  
 12 *Mueller*, 322 F.3d 573, 580 (9<sup>th</sup> Cir. 2003). To demonstrate cause for a procedural default,  
 13 the petitioner must establish that some external and objective factor impeded her efforts to  
 14 comply with the state's procedural rule. *E.g., Hivala v. Wood*, 195 F.3d 1098, 1105 (9<sup>th</sup> Cir.  
 15 1999). To satisfy the prejudice requirement, she must show that the alleged error resulted  
 16 in actual harm. *E.g., Vickers v. Stewart*, 144 F.3d 613, 617 (9<sup>th</sup> Cir. 1998).

17 A petitioner may seek to establish cause by showing that the procedural default  
 18 resulted from a constitutional deprivation of effective assistance of counsel under the

19 \_\_\_\_\_  
 20 <sup>35</sup>(...continued)

21 similarly is unpersuasive. A determination of whether a petitioner has been prejudiced by alleged ineffective  
 22 assistance of appellate counsel in failing to raise a substantive claim – and/or of whether the petitioner can  
 23 establish cause and prejudice to overcome a procedural bar to the claim – does not constitute an adjudication  
 24 of the merits of the underlying substantive claim which overcomes a procedural default. If the procedural  
 25 default of an underlying substantive claim could be avoided based upon this circular argument any time that a  
 state court considered a claim of prejudice on an ineffective assistance claim and/or on an effort to overcome  
 a state procedural bar, the procedural default doctrine would be largely dead letter. In any event, it is firmly  
 established law that review of a defaulted claim will be barred even if the state court also rejected the claim  
 on the merits in the same decision. *See, e.g., Bennet v. Mueller*, 322 F.3d 573, 580 (9<sup>th</sup> Cir. 2003).

26 The controlling question under this Court's prior rulings at this point instead is whether petitioner was  
 27 denied effective assistance of appellate counsel when direct appeal counsel failed to raise the claims in  
 28 federal Ground 3 on direct appeal. That is the only question as to procedural default that was left open for  
 further argument in the answer and reply. Petitioner, again, already had made her record as to her other  
 arguments, and – absent a motion for reconsideration – continued argument as to procedural default issues  
 that had been fully briefed and decided was not contemplated or sanctioned by the Court's prior order.



1 *Strickland*<sup>36</sup> standard. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645,  
2 91 L.Ed.2d 397 (1986).

3 The Third and Sixth Circuits have held that when a federal habeas court evaluates a  
4 claim of ineffective assistance of counsel for purposes of determining whether the petitioner  
5 can establish cause to overcome a procedural default, the court applies *de novo* review rather  
6 than deferential review under the AEDPA. See *Hall v. Vasbinder*, 563 F.3d 222, 236-37 (6th  
7 Cir.2009); *Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir.2006); *Fischetti v. Johnson*, 384 F.3d  
8 140, 154-55 (3d Cir.2004). The Court finds the reasoning behind these decisions as  
9 articulated by the Third Circuit in *Fischetti* persuasive and accordingly considers the issue *de*  
10 *novo* herein.

11 Under *Strickland*, a petitioner must establish that (1) her counsel's performance was  
12 deficient, and (2) she suffered prejudice as a result. 466 U.S. at 687, 104 S.Ct. at 2064. To  
13 be deficient, an attorney's conduct must fall below an "objective standard of reasonableness"  
14 established by "prevailing professional norms." 464 U.S. at 687-88, 104 S.Ct. at 2064-65. To  
15 demonstrate prejudice, the petitioner does not need to show that her counsel's deficient  
16 performance more likely than not affected the outcome of the case. Rather, she must  
17 demonstrate only a "reasonable probability that, but for counsel's unprofessional errors, the  
18 result of the proceeding would have been different." 464 U.S. at 694, 104 S.Ct. at 2068. A  
19 "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."  
20 *Id.*

21 When evaluating claims of ineffective assistance of appellate counsel, the  
22 performance and prejudice prongs of the *Strickland* standard substantially overlap. E.g.,  
23 *Bailey v. Newland*, 263 F.3d 1022, 1028-29 (9<sup>th</sup> Cir. 2001); *Miller v. Keeney*, 882 F.2d 1428,  
24 1434 (9<sup>th</sup> Cir. 1989). On the one hand, the failure to present a weak argument on direct  
25 appeal neither falls below an objective standard of competence nor causes prejudice to a  
26 petitioner for the same reason – because the omitted issue had little or no likelihood of

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27  
28 <sup>36</sup> *Strickland v. Washington*, 466 U.S. 668, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

1 success. *Id.* On the other, the failure to present a strong issue on appeal can both constitute  
2 deficient performance and cause prejudice also for the same reason – because appellate  
3 counsel failed to pursue an issue that had a reasonable probability of changing the outcome  
4 of the proceeding. Accordingly, the reviewing court must look to the merits of the omitted  
5 issue to properly address a claim of ineffective assistance of appellate counsel. *E.g.*,  
6 *Moormann v. Ryan*, 628 F.3d 1102, 1106-07 (9<sup>th</sup> Cir. 2010).

7 The Court therefore looks to the merits of Ground 3, in seeking to determine whether  
8 petitioner was deprived of effective assistance of appellate counsel in order to determine, in  
9 turn, whether she can establish cause and prejudice to overcome the procedural default of  
10 the claims in Ground 3.

11 The Supreme Court of Nevada concluded in *Byford*, which was on appeal at the same  
12 time as Pinkston’s appeal, that the *Kazalyn* instruction erroneously “blur[red] the distinction  
13 between first- and second-degree murder” by failing to adequately distinguish between the  
14 distinct elements of deliberation and premeditation required for a conviction for first-degree  
15 murder as opposed to lesser homicide offenses. 116 Nev. at 234-36 & n.4, 994 P.2d at 713-  
16 14 & n.4. The state supreme court approved a jury instruction in lieu of the *Kazalyn*  
17 instruction that expressly and specifically distinguished between the three separate elements  
18 of willfulness, deliberation and premeditation. The instruction approved in *Byford*, *inter alia*,  
19 carried forward the concept that premeditation “may be as instantaneous as successive  
20 thoughts of the mind.” The instruction further stated, however, that “[a] mere unconsidered  
21 and rash impulse is not deliberate, even though it includes the intent to kill.” The approved  
22 instruction concluded: “A cold, calculated judgment and decision may be arrived at in a short  
23 period of time, but a mere unconsidered and rash impulse, even though it includes an intent  
24 to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first  
25 degree.” 116 Nev. at 236-37, 994 P.2d at 714-15.

26 The instruction approved in *Byford* was substantially similar to the instruction requested  
27 by defense counsel and rejected by the state district court at Pinkston’s trial. The defense  
28 proposed instruction concluded, *verbatim*, with the same sentence quoted above that

1 concludes the instruction approved in *Byford*.<sup>37</sup> At Pinkston's trial, the state district court  
 2 instead gave the *Kazalyn* instruction. That instruction included no language precluding a  
 3 conviction for first-degree murder for a killing committed following "a mere unconsidered and  
 4 rash impulse." The instruction instead included only the language that premeditation could  
 5 be "as instantaneous as successive thoughts of the mind." The instruction directed the jury  
 6 that "[i]f the State proves beyond a reasonable doubt that the act constituting the killing has  
 7 been preceded by and has been *the result of premeditation, no matter how rapidly the*  
 8 *premeditation is followed by the act constituting the killing, it is wilful, deliberate, and*  
 9 *premeditated murder.*<sup>38</sup>

10 The Supreme Court of Nevada subsequently held that the giving of a *Kazalyn*  
 11 instruction does not give rise to a federal due process violation. *Garner, supra*. The Ninth  
 12 Circuit has held, however, that the state supreme court's holding rejecting the federal due  
 13 process claim was contrary to clearly established federal law -- *based entirely upon controlling*  
 14 *United States Supreme Court precedent decided prior to Pinkston's trial and appeal*. See  
 15 *Polk*, 503 F.3d at 909-11. The role that the *Kazalyn* charge played in the charge as a whole  
 16 and the exacerbating effect of the State's reliance upon the *Kazalyn* instruction in closing  
 17 argument make this case virtually indistinguishable from *Polk* in this regard. See *id.* This  
 18 Court of course is bound by the Ninth Circuit's holding that the state supreme court's  
 19 conclusion that there is no federal due process violation is contrary to clearly established  
 20 federal law as determined by the United States Supreme Court.<sup>39</sup>

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21  
 22 <sup>37</sup>#18, Ex. 46, at electronic docketing page 9.

23 <sup>38</sup>#18, Ex. 47, Instruction No. 8 (emphasis added).

24 <sup>39</sup>To the extent that the Nevada Supreme Court disagrees with *Polk's* analysis of the constitutional  
 25 issue in *Nika, supra*, this Court is bound by the Ninth Circuit's *Polk* decision as to the application of clearly  
 26 established federal law rather than the analysis in the Nevada Supreme Court's *Nika* decision. While the  
 27 Nevada Supreme Court has sought to recast the *Kazalyn* issue as – in one fashion or another – a purely  
 28 state law issue in *Garner* and then in *Nika*, the Ninth Circuit to date has been unpersuaded, at least following  
*Garner*. See, e.g., *Polk*, 503 F.3d at 911 ("Instead of acknowledging the violation of *Polk's* due process right,  
 the Nevada Supreme Court concluded that giving the *Kazalyn* instruction in cases predating *Byford* did not

(continued...)

1 Such a federal due process violation, however, is subject to harmless error analysis.  
 2 *Polk*, 503 F.3d at 911. A defendant or petitioner will be entitled to relief only if “the error had  
 3 a substantial and injurious effect or influence in determining the jury’s verdict.” *Polk*, 503 F.3d  
 4 at 911 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353  
 5 (1993)). If the record leaves the reviewing court in “grave doubt” as to whether the error had  
 6 such an effect, the defendant or petitioner is entitled to relief. *Id.*<sup>40</sup>

7 For example, in *Polk*, the evidence of deliberation consisted of the following: (1) *Polk*  
 8 had threatened and fought with the victim two months before, (2) there was a loud argument  
 9 shortly before gunshots were heard; and (3) *Polk* wore a bulletproof vest on the evening of  
 10 the murder. The Ninth Circuit concluded that this evidence “was not so great that it precluded  
 11 a verdict of second-degree murder.” The court noted that prior statements made as a result  
 12 of agitation or emotional distress do not always connote an intent to actually commit violence,  
 13 that an argument prior to the homicide actually tended to support a conclusion that the killing  
 14 was not done with “coolness and reflection,” and that donning a bulletproof vest potentially  
 15 reflected a defensive step as opposed to deliberation to commit murder. When these  
 16 competing inferences were coupled with a jury instruction and prosecutorial argument that  
 17 all that was required was successive thoughts of the mind, the court stated that “we simply  
 18 cannot conclude that the *Kazalyn* error was harmless.” 503 F.3d at 912-13.

19 \_\_\_\_\_  
 20 <sup>39</sup>(...continued)  
 21 constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the *Kazalyn*  
 22 instruction issue as purely a matter of state law.”; see also *Chambers v. McDaniel*, 549 F.3d 1191, 1190 &  
 n.1 (9<sup>th</sup> Cir. 2008)(declining to reach respondents’ argument that *Polk* was wrongly decided because the  
 subsequent panel was bound by the prior panel opinion in *Polk*).

23 Respondents’ rely upon Instruction No. 10 in this case as clarifying the distinction between first- and  
 24 second-degree murder. #35, at 21. The instruction in question, however, defines second-degree murder in  
 25 pertinent part as an unlawful killing where there is malice aforethought, “but the evidence is insufficient to  
 26 establish premeditation and deliberation.” #18, Ex. 47, Instruction No. 10. If the charges specifying what  
 evidence is sufficient “to establish premeditation and deliberation” are defective, Instruction No. 10 then  
 merely incorporates and perpetuates the same error rather than corrects the error.

27 <sup>40</sup>The Court notes that the standard applied by the Supreme Court of Nevada while addressing the  
 28 claim of ineffective assistance of appellate counsel was not the same as the *Brecht* harmless error standard.  
 The state supreme court instead looked to whether the evidence supporting the first-degree murder charge  
 was “significant,” which is not the same as the *Brecht* harmless error standard. #20, Ex. 101, at 8-9.

1 In the subsequent decision in *Chambers v. McDaniel*, 549 F.3d 1191 (9<sup>th</sup> Cir. 2008),  
2 the Ninth Circuit addressed the issue of harmless error as to a *Kazalyn* error in a case where  
3 the State relied upon evidence “that Chambers stabbed Chacon seventeen times; that the  
4 wounds penetrated three inches into the body and were located in two separate clusters of  
5 wounds; and that Chambers was not mentally disturbed, but at the most merely drunk.” The  
6 court concluded that this evidence did “not demonstrate the key feature of the element of  
7 deliberation” as the evidence “[i]f anything . . . seems to weigh in favor of second-degree  
8 murder committed while in the throes of a heated argument.” The court noted the state  
9 supreme court’s description of the evidence that “‘Chambers murdered the victim in a drunken  
10 state, which indicated no advanced planning, during an emotionally charged confrontation in  
11 which Chambers was wounded and his professional tools were being ruined.’” The Ninth  
12 Circuit concluded that “[s]ince we are left ‘in grave doubt’ about whether the jury would have  
13 found deliberation on [Chambers’] part if it had been properly instructed, we conclude that the  
14 error had a substantial and injurious effect or influence on the jury’s verdict.” 549 F.3d at  
15 1200-01.

16 In the present case, the trial record similarly gives rise to grave doubt for a reviewing  
17 court in considering whether the *Kazalyn* error had a substantial and injurious effect on the  
18 jury’s verdict. To be sure, a jury potentially could infer deliberation from the options memo  
19 – prepared up to three weeks prior to the incident – and Pinkston’s having the guardianship  
20 document notarized on the day of the shooting. Yet, as in *Polk* and *Chambers*, this evidence  
21 did not preclude a verdict of second-degree murder. Under the law and closing arguments  
22 presented, the jury could have convicted Pinkston of first-degree murder even if it believed  
23 both: (a) Pinkston’s position that the options memo was merely an effort to work through her  
24 problems in writing one day, consistent with her sociology training, rather than a declaration  
25 of an actual intent to kill Payne; and (b) that she notarized the guardianship document that  
26 day because she was concerned for her own safety and she was preparing to file the  
27 document in court the next day. All that the jury needed to believe to convict Pinkston of first-  
28 degree murder on the law given and arguments made at her trial was that Pinkston formed

1 the intent to kill Payne as she fired, as all that was required was a state of mind “as  
2 instantaneous as successive thoughts of the mind.”<sup>41</sup>

3 In this regard, the fact that Pinkston fired a second time after an interval potentially of  
4 ten seconds is not in and of itself determinative. The defendant in *Polk* fired multiple times,  
5 hitting the victim twice, and, similar to the present case, the prosecution relied upon the  
6 multiple shots to establish the requisite state of mind for first degree murder. *Compare* 503  
7 F.3d at 905 with #18, Ex. 44, at 43. And, as noted above, the defendant in *Chambers* struck  
8 the victim multiple times with the knife. In neither case was the fact of multiple shots or knife  
9 strikes determinative of the harmless error issue. Moreover, in the present case, the  
10 evidence tended to establish that it was the first rather than the second shot that dropped  
11 Payne “like a rock” and killed him. Pinkston’s state of mind when she fired the second shot  
12 did not establish her state of mind when she fired the first and fatal shot.

13 The *Kazalyn* error accordingly was not harmless error in Pinkston’s case under the  
14 *Brecht* standard.<sup>42</sup>

15 Pinkston’s appellate counsel thus failed to raise a federal due process claim as to jury  
16 instruction error that was supported by then-existing established United States Supreme  
17 Court precedent and that went to the very heart of the case – state of mind. If adjudicated  
18 on the merits, the issue is a winning issue on the merits on federal habeas review, even  
19 following the adoption of deferential review under the AEDPA. The Ninth Circuit has held that

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21 <sup>41</sup>#18, Ex. 44, at 40 (State’s closing argument).

22 <sup>42</sup>The Court additionally notes that a cold and calculated judgment to commit murder would have  
23 been more reflected by a killer staying out of view and laying in wait for Payne to exit the building, walking  
24 directly up and shooting him, and promptly seeking to leave the scene before she could be identified.  
25 Pinkston instead went up to a business in broad daylight, directly interacted with at least one potential  
26 witness, had a discussion and argument with Payne over an extended period in plain view of numerous  
27 witnesses at a facility with multiple surveillance cameras, fairly precipitously shot Payne as he was walking to  
28 his truck following that argument, left fairly quickly but with a trail of witnesses in her wake, and turned herself  
into the police a relatively short time after the shooting. While a first-degree murder verdict by a properly-  
instructed jury perhaps might have withstood a challenge to the sufficiency of the evidence, that is not the  
standard for determining harmless error. Given the highly debatable and hotly contested issue of state of  
mind in the case and the arguable competing inferences that could be drawn from the evidence relied upon  
the State to establish that state of mind, the *Kazalyn* error was not harmless under the *Brecht* standard.

1 the state supreme court's failure to recognize the federal due process error is contrary to  
2 clearly established federal law, based upon United States Supreme Court precedent that was  
3 on the books at the time of Pinkston's trial. It clearly was deficient performance to not raise  
4 such a strong federal constitutional issue on direct appeal. Even if, *arguendo*, the state of  
5 Nevada decisional law as to what instruction the state supreme court approved was not clear,  
6 the requirements of federal due process in this context were clear, under clearly established  
7 Supreme Court precedent at the time of Pinkston's trial. The jury instructions could not  
8 eliminate the State's burden of proof on an element that must be proved to establish first-  
9 degree murder, and the *Kazalyn* instruction did so as to deliberation. *Polk*, 503 F.3d at 911.

10 Appellate counsel therefore provided deficient performance in failing to raise the claims  
11 in federal Ground 3 on direct appeal.<sup>43</sup>

12 On the prejudice prong, the Supreme Court of Nevada – to this day – does not  
13 recognize the presence of a federal due process violation arising from the giving of a *Kazalyn*  
14 instruction. The state supreme court has held that the giving of a *Kazalyn* instruction does  
15 not violate federal due process guarantees, a stance that the Ninth Circuit has held is contrary  
16 to clearly established federal law as determined by the United States Supreme Court. *Polk*,  
17 *supra*. The result on Pinkston's direct appeal therefore would not have been different even  
18 if a federal claim based upon the *Kazalyn* error had been presented and fully briefed by  
19 appellate counsel.

20 The prejudice prong of *Strickland*, however, requires that there be a reasonable  
21 probability that the result of the "proceeding" would have been different, with a reasonable  
22

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23 <sup>43</sup>The attorney who briefed the appeal acknowledged at the state post-conviction evidentiary hearing  
24 that federal case law as to jury instruction error, "undoubtedly existed," but he did not cite it. Counsel testified  
25 that he believed that he adequately presented a federal issue merely by stating in the conclusion paragraph of  
26 the reply brief that petitioner was deprived of her right to a "fair trial." See #20, Ex. 87, at 6-12. This belief  
27 clearly was erroneous and objectively unreasonable when counsel briefed the appeal in July 1998 and  
28 February 1999. See, e.g., *Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 2081, 135 L.Ed.2d 457  
(1996); *Johnson v. Zenon*, 88 F.3d 828 (9<sup>th</sup> Cir. 1996); see also *Hivala v. Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir.  
1999). A belief that counsel could present a serious and substantial federal due process claim by failing to  
cite apposite United States Supreme Court authority and instead only referring conclusorily to a right to a "fair  
trial" in a generic concluding sentence in a reply brief fell below an objective standard of reasonableness  
established by prevailing professional norms.



1 probability being a probability sufficient to undermine confidence in the outcome of the  
 2 “proceeding.” 464 U.S. at 694, 104 S.Ct. at 2068. While the proceeding in question in this  
 3 context generally will be the appeal itself, the Court is persuaded by the Seventh Circuit’s  
 4 holding that the pertinent proceeding extends to later discretionary review and/or federal  
 5 habeas review, such that the failure to preserve a claim on direct appeal that would lead to  
 6 a different outcome on later review establishes the requisite prejudice under *Strickland*. See  
 7 *Freeman v. Lane*, 962 F.3d 1252, 1258-59 (7<sup>th</sup> Cir. 1992). The outcome of a direct appeal  
 8 in this instance would not have been different only because the state supreme court has  
 9 rejected the federal claim based upon a holding that is contrary to clearly established federal  
 10 law. It would be a strange result indeed if a petitioner could not establish prejudice from  
 11 appellate counsel’s failure to preserve the federal claim in that situation on an ineffective  
 12 assistance claim reviewed *de novo*.<sup>44</sup>

13 The Court accordingly holds that appellate counsel provided ineffective assistance of  
 14 counsel. Counsel’s failure to raise a federal due process claim based upon the *Kazalyn* error  
 15 constituted deficient performance and petitioner sustained prejudice as a result of counsel’s  
 16 deficient performance.

17 The ineffective assistance of appellate counsel establishes cause for the procedural  
 18 default. *Murray v. Carrier, supra*. The Court further concludes that prejudice has been  
 19 established as to the procedural default. The prejudice that demonstrates ineffective  
 20 assistance of counsel also demonstrates prejudice as to a procedural default.<sup>45</sup> Moreover,  
 21 in all events, consistent with the discussion above, the Court concludes that the underlying  
 22

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23 <sup>44</sup> As the Seventh Circuit acknowledged in *Freeman*, and this Court acknowledges herein, the  
 24 Supreme Court of Nevada of course is not bound to follow the decisions of a federal circuit court. This Court,  
 25 however, is bound by the Ninth Circuit precedent in *Polk* when considering a claim of ineffective assistance of  
 26 counsel in connection with a claim of cause and prejudice to overcome a procedural default. Under that  
 binding circuit precedent, the state supreme court’s federal law holding is contrary to clearly established  
 federal law as determined by the United States Supreme Court.

27 <sup>45</sup> See *Johnson v. Sherry*, 586 F.3d 439, 447 n.7 (6<sup>th</sup> Cir. 2009), *cert. denied*, \_\_\_ U.S. \_\_\_, 131 S.Ct.  
 87, 178 L.Ed.2d 242 (2010)(standards overlap); *Joseph v. Coyle*, 469 F.3d 441, (6<sup>th</sup> Cir. 2006) (*Strickland*  
 28 prejudice establishes prejudice for purposes of cause and prejudice); *Prou v. United States*, 199 F.3d 37, 49  
 (1<sup>st</sup> Cir. 1999)(“one and the same”); *Mincey v. Head*, 206 F.3d 1106, 1147 n.86 (11<sup>th</sup> Cir. 2000)(same).



1 *Kazalyn* error clearly worked to petitioner's actual and substantial disadvantage, infecting her  
2 entire trial with error of constitutional dimensions, satisfying the relevant prejudice standard.<sup>46</sup>

3 The Court accordingly considers Ground 3 despite the procedural default of the  
4 independent substantive claim in the state courts. Because the state courts did not review  
5 the procedurally barred substantive claim on the merits, it is reviewed *de novo* in federal  
6 court. *E.g., Chaker v. Crogan*, 428 F.3d 1215, 1221 (9<sup>th</sup> Cir. 2005). For the reasons  
7 discussed above, the Court concludes on *de novo* review of Ground 3 that the use of the  
8 *Kazalyn* charge in Pinkston's case deprived petitioner of due process of law and did not  
9 constitute harmless error.

10 The Court therefore will grant a conditional writ of habeas corpus as further specified  
11 below. The Court thus does not reach the remaining claims presented.<sup>47</sup>

12 IT THEREFORE IS ORDERED that the petition for a writ of habeas corpus is  
13 conditionally GRANTED and that, accordingly, the state court judgment of conviction hereby  
14 is VACATED and petitioner shall be released from custody within thirty (30) days of the later  
15 of the conclusion of any proceedings seeking appellate or *certiorari* review of the Court's  
16 judgment, if affirmed, or the expiration of the delays for seeking such appeal or review, unless  
17 the State files a written election in this matter within the thirty day period to retry petitioner and  
18 thereafter commences jury selection in the retrial within one hundred twenty (120) days  
19 following the election to retry petitioner, subject to reasonable request for modification of the  
20 time periods in the judgment by either party pursuant to Rules 59 or 60.

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23 <sup>46</sup> See *Murray v. Carrier*, 477 U.S. at 494, 106 S.Ct. at 2648 (prejudice standard).

24 <sup>47</sup> The Court's alternative dispute resolution resources are available to the parties at any time. At the  
25 time of the offense, a defendant convicted of first-degree murder with the use of a dangerous weapon and  
26 sentenced to consecutive sentences of life with the possibility of parole would be eligible for consideration for  
27 parole on each sentence after a minimum of ten years had been served on the sentence. A defendant  
28 convicted instead of second-degree murder with the use of a deadly weapon and sentenced to consecutive  
sentences of life or less would be eligible for consideration for parole on each sentence after a minimum of  
five years had been served on each sentence. See N.R.S. 200.030, as amended through 1989 Laws, ch.  
408, § 1, p. 865, ch. 631, § 1, p. 1451. It would appear that petitioner has been incarcerated approximately  
fourteen years at this juncture.

1 The Clerk of Court shall enter final judgment accordingly in favor of petitioner and  
2 against respondents, conditionally granting the petition for a writ of habeas corpus as  
3 provided above.

4 The Clerk further shall provide a copy of this order and the judgment to the Clerk of  
5 the Eighth Judicial District Court, in connection with that court's No. C130789.

6 DATED: March 22, 2011

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KENT J. DAWSON  
United States District Judge  
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